

The Commission takes a step back in the fight for the Rule of Law

 verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/

Maciej Taborowski Mi 3 Jan 2018

Mi 3 Jan 2018

(1) Media reports of 20 December 2017 almost dwarfed the news of the Commission moving to initiate the judicial stage of the infringement proceedings against Poland based on Article 258 TFEU, in relation to certain provisions of the Act on the Common Courts System (the CCS Act). Under these proceedings, the breach of EU law may be established by the CJEU much faster than in the course of the “political” procedure based on Article 7 TEU, with fines which might be consequently imposed on Poland based on Article 260 TFEU. And neither of the above will require the Member States to vote on the possible sanctions (such requirement exists in the case of proceedings based on Article 7 TEU).

(2) According to the succinct [press release](#) dated 20 December 2017, the Commission’s objections within the procedure based on Article 258 TFEU regard discrimination based on sex, in view of different retirement thresholds introduced for female and male judges (the age of 60 and 65, respectively). That case (and charge) carries a clear EU component (it falls within the scope of [Directive 2006/54/EC](#) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation), and may be resolved by the CJEU. The Commission has a solid legal basis as well as strong arguments to support its charges as Directive 2006/54/EC does not, in principle, provide for any exceptions to the principle of equal treatment in the context of a pension scheme, such as the one applicable with respect to judges. It can be noticed at this point that while the [Directive 79/7](#), pertaining to the general pension scheme, does provide for a derogation from gender equality (Article 7 sec. 1 letter a), no such derogation is envisaged in the Directive 2006/54/EC regulating specific pension schemes (applicable e.g. to specific professional groups, such as judges). Moreover, due to the different gender criteria, benefits obtained by a woman-judge due to achieving the retirement age will, for at least five years, be lower than those to which she would be entitled while receiving remuneration for continued performance of her judicial duties. In light of the case law of CJEU, benefits resulting from specific pension schemes (e.g. retirement) constitute remuneration in the meaning of Article 157 TFEU (C-262/88 *Barber*). Salaries of retired judges are lower, therefore women would obtain remuneration lower than men under the same circumstances.

(3) The Commission’s press release of 20 December 2017 indicates that the scope of the infringement proceedings initiated against Poland includes also the regulations of the CCS Act regarding consent to be given by the Minister of Justice to the prolongation of the mandate of judges which have reached retirement age. Since the criteria for the prolongation are too vague and there will be no judicial control of their application, the Commission raises the concern that the Minister of Justice’s powers are discretionary and pose a threat to judicial independence.

The press release indicates that the Commission may want to link this issue also to the Directive 2006/54/EC, possibly in connection with the discriminatory affiliation of judges to pension scheme following retirement. There might also be another, convincing approach to the issue, according to which the lack of independence of national courts may have a significant influence on the functioning of important elements of the system of EU law (mutual trust, protection of powers of EU citizens, effective judicial protection within EU, effective application of EU law, functioning of the internal market etc.) and, for this reason, it falls within the scope of application of EU law.

If the Commission is able to justify the EU component of the case, it has a solid legal basis and strong arguments to support its charges. The Court of Justice may then establish occurrence of the breach of the standard of independent judiciary, in the meaning of Article 19 sec. 1 in connection with Article 47 of the CHFR. In light of these regulations, the Member States provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law (Article 19 sec. 1 TFEU) – so that everyone whose rights and freedoms guaranteed by EU law have been infringed has the right to an effective legal remedy as well as access to an “independent and impartial” tribunal (Article 47 CHFR). Such guarantees of independence and impartiality rest on the existence of rules, particularly statutory and procedural, thanks to which it is possible, to the belief of bodies governed by law, to rule out any and all reasonable doubt as to the independence of this authority from the external factors, as well as any uncertainty as to the neutrality of the judge with regard to the conflicting interests of parties to the dispute (C-682/15, *Berlio Investment Fund*, points 60–62).

The EU standard in this matter has been rather precisely defined. Independence of court is excluded in the case of lack of specific guarantees allowing to rule out any and all reasonable doubt as to the independence of this authority from the external factors, including the executive. The too general statutory criteria based on which the Minister of Justice grants consent to the continued performance of duties by a judge who has achieved retirement age, in conjunction with lowering the age threshold for retirement (which applies also to judges remaining in office) and other elements of the same procedure (lack of time-frame to reach a decision, lack of judicial control) may not be sufficiently precise to rule out any reasonable doubt as to the independence of the judicial authorities from the executive branch (Minister of Justice who is also the Chief Prosecutor of Poland).

(4) In light of the Commission's former press releases in regard to the infringement proceedings against Poland at its pre-judicial stage (Letter of Formal Notice and Reasoned Opinion), the Commission had also raised objections regarding the regulation of the CCS Act which gives the Minister of Justice discretion in appointing and dismissing presidents of courts. That possibility would also pose a threat to the independence of national courts since court president's perform not only administrative but also judicial functions. Apart from this, they have an important influence over other judges. It must be emphasized that during the first six months from the entry into force of the amended CSS Act the Minister of Justice would be granted the power to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, and with no possibility for the judiciary to block these decisions. In addition, no judicial review is available against

a dismissal decision of the Minister of Justice. Unfortunately, the press release from 20 December 2017 does not include any information in this respect. It seems therefore that the infringement proceedings against Poland will not cover the regulations of the CCS Act regarding appointments and dismissals of presidents of courts. That issue continues to be the subject of the Commission's application for the initiation of a procedure based on Article 7 sec. 1 TEU.

(5) The lack of the charges regarding the presidents of courts in the Article 258 TFEU procedure, which has been confirmed to the author by a spokesperson of the Commission, means that the Commission has probably ultimately opted for a conservative, safe approach, possibly described as a slightly modified “Hungarian scenario”. Let us note that the scope of the charges brought against Poland is a little wider than in the case C-286/12 *Commission v. Hungary* since, in addition to the prohibition resulting from the directive (in the Hungarian case, the prohibition regarded discrimination based on age, not sex), it involves also the issue of independence of courts (Article 19 sec. 1 TFEU and Article 47 CHFR) that was not the element of the Hungarian case. However, the press release of 20 December 2017 indicates that the charge regarding independence of courts has been upheld only in the context potentially related to the directive prohibiting sex-based discrimination (retirement of judges), and it has been dropped in the context not related to the directive (appointment and dismissal of presidents of courts by the Minister of Justice). Hence, the Commission decided to proceed in the manner that will most likely produce a positive outcome for the Commission before the CJEU, and abandoned the charges (having no precedent indeed) which, once brought, might leave the Commission exposed to defeat before the CJEU – but then, they might also have confirmed a greater impact of the Union law to the organisation of national courts.

(6) The Hungarian scenario adopted in Poland's case means that the practical impact of the infringement proceedings and the potential judgment establishing the failure to fulfill obligations under Article 258 TFEU will be most limited, and may be of negligible influence on holding back the changes in the Polish judiciary performed by the current parliamentary majority. In the Hungarian cases regarding the data protection inspector (C-288/12) whose term of office (as an independent authority) has been interrupted as well as the lowering of retirement age of judges (C-286/12), the judgements issued by the CJEU, establishing the failure to fulfill obligations, have been of no practical influence on reversing the effects of the adopted national solutions.

(7) The Commission's press release of 20 December 2017 does also not provide a specific scope of the charges (i.e. whether they regard the CCS Act or the instances of applying law), nor does it specify whether the Commission will apply for accelerated procedure or interim measures. However, bearing the Hungarian experience in mind, if CJEU judgment establishing the failure to fulfill obligations is to be of any real, practical importance for protection of independence of courts, the Commission needs to include the instances of applying the CCS Act in the scope of its charges and apply for accelerated procedure and the application of a precautionary measure consisting in suspension of application of the national act of law until the case is resolved before CJEU. Otherwise, the possible confirmation by CJEU of the breach of EU law may prove practically meaningless for the

changes made to the judiciary system. In the case of the Hungarian judges, even the application of accelerated procedure and the issuing the judgment by CJEU within merely a few months did not cause reversal of the impact of national regulations on the judiciary.

In conclusion – those who were hoping for an effective intervention of the European Commission before the Court of Justice in connection with the “reform” of the Polish justice system, may slowly begin to lose hope. Clearly, the Commission has decided that in view of the crisis of the Rule of Law, only the political pressure of other Member States under the procedure based on Article 7 TEU has the capacity to provide a feasible solution.

LICENSED UNDER CC BY NC ND

SUGGESTED CITATION Taborowski, Maciej: *The Commission takes a step back in the fight for the Rule of Law*, *VerfBlog*, 2018/1/03, <http://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/>, DOI: <https://dx.doi.org/10.17176/20180103-121110>.